

Jennifer Lewkowski
Nevada Bar No. 10823
PHILLIPS, SPALLAS & ANGSTADT LLC
504 S. Ninth Street
Las Vegas, Nevada 89101
(702) 938-1510

*Attorney for Defendant
Wal-Mart Stores, Inc.*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BETTY BRUE,

Plaintiff,

vs.

CV –
(Clark County District Court Case No.
A583321 Dept. No. X)

[JURY DEMAND]

WAL-MART STORES, INC. dba WAL-
MART STORE #1584; W&W
PARTNERSHIP; DOE EMPLOYEES 1
through 5, DOES 1 through 10, and ROE
CORPORATIONS 1 through 10, inclusive,

Defendants.

PETITION FOR REMOVAL OF CIVIL ACTION

COMES NOW, Petitioner WAL-MART STORES, INC., by and through its attorneys, the law
offices of PHILLIPS, SPALLAS & ANGSTADT, LLC, hereby submits and respectfully shows:

I.

Petitioner is a Defendant in the above-entitled action.

II.

The above-entitled action was commenced in the Eighth Judicial District Court in and for
Clark County, District of Nevada, and is now pending in that Court. Process was served upon this
Petitioner through a process server on or about March 9, 2009. The Complaint, as Exhibit "A,"
attached hereto, is the "first paper" received by Petitioner from which it could ascertain removability.

III.

This Petition is filed timely pursuant to 28 U.S.C. § 1446(b).

1 IV.

2 This action is a civil action over which this Court has diversity jurisdiction under the
3 provisions of 28 U.S.C. § 1332 and 28 U.S.C. § 2201, and is one which may be removed to this Court
4 by Petitioner, pursuant to the provisions of 28 U.S.C. § 1441(b).

5 V.

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7 Petitioner is informed, believes and thereon alleges that Plaintiff Betty Brue, is and was at all
8 times relevant herein, a resident of the State of Nevada. Petitioner is informed, believes and thereon
9 alleges that Plaintiff has sued non-diverse W & W Partnership as a sham defendant, for the purpose of
10 destroying diversity jurisdiction. As set forth further below, Defendant W & W Partnership had no
11 control, operation or maintenance of the subject Wal-Mart store where Plaintiff claims to have slipped
12 and fell. Plaintiff's Complaint fails to state a cause of action against that Defendant. Thus diversity
13 between the parties remains.
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15 VI.

16 Petitioner WAL-MART STORES, INC. is, and was at the time this action was commenced, a
17 Delaware corporation with its principal place of business in the State of Arkansas. Petitioner is
18 informed, believes and thereon alleges that W & W Partnership, a Nevada partnership, has not
19 appeared in the action, therefore that Defendant could not consent to or join in the removal.
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21 VII.

22 The above-entitled civil action is for personal injuries Plaintiff Betty Brue allegedly received
23 from an incident at a Wal-Mart store in Las Vegas, Nevada. Defendant Wal-Mart does not dispute
24 control and operation of the subject premises. Defendant W & W Partnership has no right of
25 maintenance, control or operation over the interior of the subject store.

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VIII.

A copy of the Defendant's Petition for Removal, seeking removal of the above-entitled action to the United States District Court, District of Nevada, together with a copy of the Complaint have been deposited with the Deputy Clerk in the County Clerk's office for the Eighth Judicial District Court in and for Clark County, Nevada.

IX.

Copies of all pleadings served upon Petitioner in the above-entitled action are filed herewith.

X.

This Petition is filed with this Court within thirty (30) days after Petitioner's receipt of Plaintiff's Complaint, served on or about March 9, 2009. Plaintiff's Complaint seeks general and special damages in excess of \$10,000, in addition to punitive damages and attorney's fees. Thus, the sum of damages sought by Plaintiff satisfies the jurisdictional requirement under 28 U.S.C. § 1441(b).

XI.

This Petition is filed with this Court within thirty (30) days after this Petitioner's receipt of the "first paper" from which the amount in controversy may be ascertained in the above-entitled action. Compensatory and punitive damages, as well as attorney fees, may be considered in determining the amount in controversy. (*Meisel v. Allstate Indem. Co.* (E.D. Cal. 2005) 357 F. Supp. 2d 1222, 1225.) Plaintiff alleges she suffered a sum in excess of \$10,000 for general, compensatory, and special damages. (Exhibit A).

Plaintiff seeks punitive damages and attorneys' fees. (Exhibit A) The Court may consider punitive damages in its determination of the amount in controversy if two prerequisites are met. First, Nevada state law must allow for recovery of punitive damages. (*Anthony v. Security Pac. Fin. Servs., Inc.* (7th Cir. 1996) 75 F.3d 311, 315.) Nevada state law allows for punitive damages in actions against employers for breach of a non-contractual obligation. (N.R.S. § 42.005.) Plaintiff may

1 recover three times the amount of compensatory damages, so long as the compensatory damages
 2 awarded totals \$100,000 or more. (*Id.*) If the compensatory damages total less than \$100,000, then
 3 plaintiff may recover up to \$300,000 in punitive damages. (*Id.*) If state law allows for punitive
 4 damages, as it does in this case, the Court has jurisdiction unless “it is clear ‘beyond a legal certainty
 5 that the plaintiff would under no circumstances be entitled to recover the jurisdictional amount.’”
 6 (*Anthony*, 75 F.3d at 315 (citations omitted).) In light of Plaintiff’s claim for special and general
 7 damages, and attorneys’ fees, Plaintiff may recover well over \$75,000 in damages. Thus, it is wholly
 8 appropriate for the Court to consider the potential punitive damages as part of the amount in
 9 controversy.
 10

11 XII.

12 Plaintiff pursues a premises liability action against Defendants, based on the existence of an
 13 alleged dangerous condition in an aisle of the subject Wal-Mart store. Defendant W & W Partnership,
 14 while owner of the real estate, has no operation, control or maintenance over the subject store’s
 15 interior, therefore it neither owes a duty to Plaintiff, nor can be found to have breached a duty to
 16 Plaintiff in this action. Defendant W & W Partnership was sued merely to defeat diversity
 17 jurisdiction. Joinder is not required by parties named as defendants solely to prevent removal. *Farias*
 18 *v. Bexar County Bd. of Trustees for Mental Health*, 925 F.2d 866, 871 (5th Cir. 1991). A non-diverse
 19 party named in the state action shall be disregarded if the party’s joinder is a “sham” or fraudulent so
 20 that no possible cause of action has been stated against that party. *Morris v. Princess Cruises, Inc.*,
 21 236 F.3d 1061, 1067 (9th Cir. 2001); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th
 22 Cir. 1998); *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th
 23 Cir. 1990); *see also McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).
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26 PRAYER

27 WHEREFORE, Petitioner prays that the above-entitled action be removed from the Eighth
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1 Judicial District Court in and for Clark County, Nevada to this Court.

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3 DATED: March 30, 2009

Respectfully submitted,

4 PHILLIPS, SPALLAS & ANGSTADT LLC

5 By: /s/ Jennifer Lewkowski
6 Jennifer Lewkowski

7 Attorney for Defendant
8 WAL-MART STORES, INC.
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AFFIDAVIT OF JENNIFER LEWKOWSKI

STATE OF NEVADA)
) ss.
 COUNTY OF CLARK)

JENNIFER LEWKOWSKI, first being duly sworn, deposes and states as follows:

1. Affiant is an attorney, duly licensed and authorized to practice law within the courts of the State of Nevada.

2. Affiant is an associate of the law firm of PHILLIPS, SPALLAS & ANGSTADT LLC, representing Petitioner, WAL-MART STORES, INC., in the case of *Brue v. Wal-Mart Stores, Inc., et al.*, Clark County District Court Case No. A583321, filed in Department No. X, of the Eighth Judicial District Court, in and for Clark County, Nevada. Affiant has prepared and read the foregoing *Petition for Removal of Civil Action* and knows the matters set forth to be true and correct to the best of her knowledge and belief.

3. On March 30, 2009, Affiant caused to be filed with the County Clerk of the Eighth Judicial District Court, in and for Clark County, Nevada, a *Notice of Filing Petition for Removal*, seeking removal of the above-mentioned action to the United States District Court, District of Nevada, together with a copy of the *Petition for Removal* and Complaint, which is the first paper from which removability may be ascertained, attached as Exhibit "A" by depositing such copies with the Deputy Clerk in the County Clerk's Office, Clark County Courthouse, 200 Lewis Avenue, Las Vegas, Nevada 89101.

4. This Petition is filed with this Court thirty (30) days after Petitioner's receipt of Plaintiff's Complaint, served on or about March 9, 2009. This Petition is filed with this Court within thirty (30) days after this Petitioner's receipt of the "first paper" from which the amount in controversy may be ascertained in the above-entitled action. Compensatory and punitive damages, as well as attorney fees, may be considered in determining the amount in controversy. (*Meisel v. Allstate Indem. Co.* (E.D. Cal. 2005) 357 F. Supp. 2d 1222, 1225.) Plaintiff alleges she suffered a sum in excess of

1 \$10,000 for general, compensatory, and special damages. (Exhibit A).

2 Plaintiff seeks punitive damages and attorneys' fees. (Exhibit A) The Court may consider
3 punitive damages in its determination of the amount in controversy if two prerequisites are met. First,
4 Nevada state law must allow for recovery of punitive damages. (*Anthony v. Security Pac. Fin. Servs.,*
5 *Inc.* (7th Cir. 1996) 75 F.3d 311, 315.) Nevada state law allows for punitive damages in actions
6 against employers for breach of a non-contractual obligation. (N.R.S. § 42.005.) Plaintiff may
7 recover three times the amount of compensatory damages, so long as the compensatory damages
8 awarded totals \$100,000 or more. (*Id.*) If the compensatory damages total less than \$100,000, then
9 plaintiff may recover up to \$300,000 in punitive damages. (*Id.*) If state law allows for punitive
10 damages, as it does in this case, the Court has jurisdiction unless "it is clear 'beyond a legal certainty
11 that the plaintiff would under no circumstances be entitled to recover the jurisdictional amount.'" (*Anthony*, 75 F.3d at 315 (citations omitted).) In light of Plaintiff's claim for special and general
12 damages, and attorneys' fees, Plaintiff may recover well over \$75,000 in damages. Thus, it is wholly
13 appropriate for the Court to consider the potential punitive damages as part of the amount in
14 controversy.
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18 5. Plaintiff pursues a premises liability action against Defendants, based on the existence
19 of an alleged dangerous condition in an aisle of the subject Wal-Mart store. Defendant W & W
20 Partnership, while owner of the real estate, has no operation, control or maintenance over the subject
21 store's interior, therefore it neither owes a duty to Plaintiff, nor can be found to have breached a duty
22 to Plaintiff in this action. Defendant W & W Partnership was sued merely to defeat diversity
23 jurisdiction. Joinder is not required by parties named as defendants solely to prevent removal. *Farias*
24 *v. Bexar County Bd. of Trustees for Mental Health*, 925 F.2d 866, 871 (5th Cir. 1991). A non-diverse
25 party named in the state action shall be disregarded if the party's joinder is a "sham" or fraudulent so
26 that no possible cause of action has been stated against that party. *Morris v. Princess Cruises, Inc.*,
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1 236 F.3d 1061, 1067 (9th Cir. 2001); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th
2 Cir. 1998); *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th
3 Cir. 1990); *see also McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

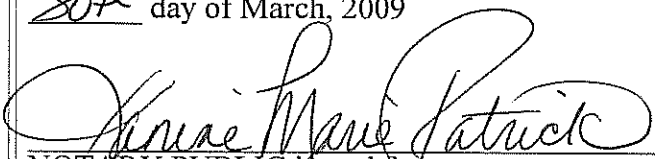
4
5 6. Affiant caused to be served a copy of the *Notice of Filing Petition for Removal* and the
6 *Petition for Removal* upon Plaintiff, by depositing it in the United States Mail, on March 30, 2009, in
7 an envelope properly addressed to:

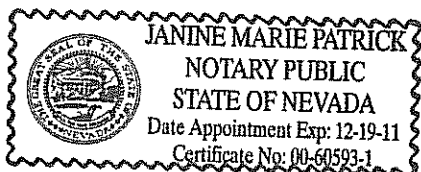
8 Robert T. Eglet, Esq.
9 MAINOR EGLET COTTLE
400 S. Fourth Street, Suite 600
Las Vegas, NV 89101

10 Affiant further sayeth naught.

11
12 
JENNIFER LEWKOWSKI

13 SUBSCRIBED and SWORN to before me this
14 30th day of March, 2009

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16 
17 NOTARY PUBLIC in and for
said County and State



CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2009, I mailed a true and correct copy of the foregoing **PETITION FOR REMOVAL OF CIVIL ACTION**, by facsimile and by U.S. Mail, to the following parties of interest, to their last known facsimile number(s) and address(es), as indicated below:

ATTORNEY OF RECORD	PHONE/FAX	PARTY
Robert T. Eglet, Esq. MAINOR EGLET COTTLE 400 S. Fourth Street, Suite 600 Las Vegas, NV 89101	Phone: (702) 450-5400 Fax: (702) 450-5451	Plaintiff


An Employee of PHILLIPS, SPALLAS & ANGSTADT LLC

EXHIBIT “A”

COMP

Robert T. Eglet, Esq.
Nevada Bar No. 3402
reglet@mainorlawyers.com
Robert M. Adams, Esq.
Nevada Bar No. 6551
badams@mainorlawyers.com
Jonathan T. Remmel, Esq.
Nevada Bar No. 8627
jremmel@mainorlawyers.com
MAINOR EGLET COTTLE
400 S. Fourth Street, Ste. 600
Las Vegas, Nevada 89101
Ph.: (702) 450-5400
Fax: (702) 450-5451
Attorneys for Plaintiff

FILED

FEB 23 5 23 PM '09

E. J. [Signature]
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

BETTY BRUE,

Plaintiffs,

vs.

WAL-MART STORES, INC. dba WAL
MART STORE #1584; W & W
PARTNERSHIP; DOE EMPLOYEES 1
through 5; DOES 1 through 10; and ROE
CORPORATIONS 1 through 10, inclusive,

Defendants.

CASE NO.
DEPT. NO.

A583321
X

COMPLAINT

Date of Hearing: N/A
Time of Hearing: N/A

Plaintiff alleges as follows:

MAINOR EGLET COTTLE

1 6. That at all times herein mentioned, Defendants, including DOE EMPLOYEES 1
2 through 5 and/or DOES 1 through 10 and/or ROE CORPORATIONS 1 through 10, inclusive,
3 were the employees and/or owners and/or operators and/or maintainers of the location(s)
4 involved in the accident fully described herein below.

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6 7. At all times mentioned, the Defendants, and each of them, were the maintainers,
7 owners, managers, inspectors, supervisors and controllers of the premises and common areas
8 generally known as WAL MART STORE #1584, located at or near 3615 S. Rainbow Blvd., Las
9 Vegas, Clark County, Nevada.

10 **FACTS COMMON TO ALL CAUSES OF ACTION**

11 8. That Plaintiff incorporates by this reference each and every allegation previously
12 made in this Complaint, as if here fully set forth.

13
14 9. On or about August 2, 2008, Defendants, while in the course and scope of their
15 employment and/or agency with other Defendants, negligently failed to maintain, manage,
16 inspect, supervise and control the premises and further failed to warn Plaintiff BETTY BRUE, of
17 hazards which resulted in Plaintiff's injuries.

18
19 10. As a direct and proximate result, Plaintiff, BETTY BRUE, slipped and fell, was
20 seriously injured and caused to suffer great pain of body and mind, some of which conditions are
21 permanent and disabling all to her general damage in an amount in excess of Ten Thousand
22 Dollars (\$10,000.00).

23 **FIRST CAUSE OF ACTION**
24 **(NEGLIGENCE)**

25 11. That Plaintiff incorporates by this reference each and every allegation previously
26 made in this Complaint, as if here fully set forth.

1 12. On or about August 2, 2008, Defendants, while in the course and scope of their
2 employment and/or agency with other Defendants, negligently failed to control, supervise,
3 repair, inspect and maintain the premises and further failed to warn Plaintiff, BETTY BRUE, of
4 hazards which resulted in Plaintiff's injuries.
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6 13. Defendants breached their duty of due care by their negligent, careless, wanton,
7 willful, and indifferent failure to act including, but not limited to, the negligent and improper
8 control, supervision, repair, inspection and maintenance of the subject premises.
9

10 14. As a direct and proximate result of the conduct of the Defendants described
11 hereinabove, Plaintiff has sustained damages in excess of TEN THOUSAND DOLLARS
12 (\$10,000.00).
13

14 15. Defendants have acted willfully and maliciously, and with oppression, fraud, or
15 malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of
16 exemplary or punitive damages.
17

18 16. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required
19 to retain the services of an attorney, and, as direct, natural, and foreseeable consequence thereof,
20 has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.
21

22 **SECOND CAUSE OF ACTION**
23 **(NEGLIGENCE PER SE)**
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25 17. Plaintiff incorporates by this reference each and every allegation previously made
26 in this Complaint, as if here fully set forth.
27

28 18. At all times mentioned herein, there were in force statutes, ordinances, uniform
building codes and regulations prohibiting the conduct exhibited by Defendants, including DOE
EMPLOYEES 1 through 5 and/or DOES 1 through 10 and/or ROE CORPORATIONS 1 through
10.

19. Defendants did not perform their duties to control, supervise, repair, inspect and

1 maintain the subject premises in accordance with applicable codes, rules, regulations, statutes,
 2 and ordinances. Thus, Defendants negligently violated the codes, rules, regulations, statutes, and
 3 ordinances which was a direct and proximate cause of and contributed to the slip and fall which
 4 injured Plaintiff.

5
 6 20. The codes, rules, regulations, statutes, and ordinances were designed to protect
 7 this class of Plaintiffs from the type of injuries sustained on the day at issue.

8 21. As a direct and proximate result of the conduct of the Defendants described
 9 hereinabove, Plaintiff has sustained damages in excess of TEN THOUSAND DOLLARS
 10 (\$10,000.00).

11 22. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required
 12 to retain the services of an attorney, and, as direct, natural, and foreseeable consequence thereof,
 13 has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

14 23. Defendants have acted willfully and maliciously, and with oppression, fraud, or
 15 malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of
 16 exemplary or punitive damages.
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1 WHEREFORE, Plaintiff prays judgment of this Court as follows:

- 2 1. General damages in an amount in excess of \$10,000.00;
- 3 2. Special damages in an amount in excess of \$10,000.00;
- 4 3. Punitive damages to punish Defendants and deter such conduct
- 5 4. Cost of suit; pre-judgment interest; post-judgment interest; attorney's fees; and
- 6 5. For such other and further relief as is just and proper.
- 7

8 DATED this 23rd day of February, 2009.

9 MAINOR EGLET COTTLE

10 By 

11 ROBERT T. EGLET, ESQ.

12 Nevada Bar No. 3402

13 ROBERT M. ADAMS, ESQ.

14 Nevada Bar No. 6551

15 JONATHAN T. REMMEL, ESQ.

16 Nevada Bar No. 8627

17 400 South Fourth Street, Suite 600

18 Las Vegas, Nevada 89101

19 Attorneys for Plaintiffs

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